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NOTES.

THE UNCONSTITUTIONALITY OF THE FOREIGN LANGUAGE LAW.—In view of the present wide-spread discussion of ways and means of absorbing our immense foreign-born population in the American melting-pot and thus preventing the threatened destruction of our institutions, the recent series of cases in the Supreme Court involving the foreign language statutes of various states has an especial significance. Of course a state may compel the teaching of English in all schools within its borders.[1] Recently some of the states have attempted to go further in their effort to make English the common

[1] Meyer v. Nebraska, 43 Sup. Ct. 625, 628 (1923).

speech of the nation in fact, and of all, not merely the majority, of its people.

The legislatures in Ohio, Iowa and Nebraska passed statutes prohibiting the teaching of foreign languages in any public, parochial or private school under the eighth grade.[2] These statutes were attacked in the courts as being violative of the due process clause of the Fourteenth Amendment to the Federal Constitution. The highest courts of all three states held these laws constitutional,[3] but in each instance the case was appealed to the United States Supreme Court. The Supreme Court, by vote of 7 to 2, held the statutes unconstitutional in each case.[4] While the court recognized the desirability of the object which the statute was designed to effect, it held that the means by which the state sought to accomplish this purpose were prohibited by the Constitution, and constituted a deprivation of personal liberty without due process of law.

It is well settled that the liberty guaranteed by the Fourteenth Amendment includes the liberty to contract and to engage in any useful employment,[5] under which head the teaching of modern languages must fall. The court extends this definition of liberty further in *Meyer v. Nebraska*,[6] to the right to acquire useful knowledge, and the right of parents to control the education of their children. Although some of these things seem to have their first recognition in this case as among the liberties safeguarded by the

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[2] The Nebraska Statute contains the following provisions:

"Section 1. No person, individually or as a teacher, shall, in any private, denominational, parochial or public school, teach any subject to any person in any language than the English language.

"Section 2. Languages other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.

"Section 3. Any person who violates any of the provisions of this act shall be deemed guilty of a misdemeanor and upon conviction, shall be subject to a fine of not less than twenty-five dollars ($25), nor more than one hundred dollars ($100), or be confined in the county jail for a period not exceeding thirty days for each offense.

"Section 4. Whereas an emergency exists, this act shall be in force from and after its passage and approval."

The Iowa and Ohio statutes are similar. See Bartels v. Iowa, 43 Sup. Ct. 628, 629 (1923).

[3] Meyer v. Nebraska, 107 Neb. 657, 187 N. W. 100 (1922); Pohl v. State, 102 Ohio 474, 132 N. E. 20 (1921); State v. Bartels, 191 Iowa 1060, 181 N. W. 508 (1921).

[4] Meyer v. Nebraska, 43 Sup. Ct. 625 (1923); Bartels v. Iowa, 43 Sup. Ct. 628 (1923); Pohl v. Ohio, 43 Sup. Ct. 628 (1923).

[5] Allgeyer v. Louisiana, 165 U. S. 578 (1897). The cases in which this idea of liberty has been developed, beginning with the Slaughter House Cases in 1872 and carried through to the Minimum Wage Law Case in 1923, are collected in Meyer v. Nebraska, 43 Sup. Ct. 625, 626.

[6] *Supra* in note 4, at p. 627.

Constitution, yet no one will doubt that they are rightly to be considered as among these protected liberties. Therefore any arbitrary curtailment of their enjoyment by the legislatures is a violation of due process.[7]

The prohibition against teaching one class of studies is certainly an arbitrary restriction of these liberties, unless some very pressing consideration of public welfare demands it. Justice Holmes, in a not too convincing dissent, admits that a prohibition against the teaching of the German languages is unconstitutional,[8] yet rather inconsistently declares that the prohibition against all modern languages is within the state's right to impose. But it seems that the danger apprehended by the legislature was the inculcation of foreign rather than American ideals into the minds of children of the immigrants. Considering the diversity of the political ideals in various countries, some harmonizing with our own, others antagonistic in varying degrees, it seems that if one admits with Justice Holmes that the legislature can prohibit the teaching of all foreign languages, one should admit as a corollary that it can prohibit any one language, if it be the native language of the people with ideals antagonistic to our own. The learned Justice seems to infer that foreign languages, like foreign citizens, are entitled to equal protection of the laws.

The basis of the majority opinion, however, seems sound. The right to teach, and the right to acquire an education in, the ordinary branches of knowledge are among the fundamental liberties which are protected by the Fourteenth Amendment. They cannot be taken away, therefore, by the legislature, except by due process of law, that is to say, by a legitimate exercise of the police power of the state. In an emergency the police power would probably extend this far. During the War in 1917-1918, it would seem that a prohibition of the teaching of German in the schools would be a valid exercise of the police power in preserving the state from the dangers of very probable enemy propaganda.[9] But in times of peace, with no warclouds on the horizon, the danger from foreign influence does not seem so great as to justify this serious repression of individual freedom. The threat to the safety of the state is too remote to warrant this decided abridgment of personal liberty. The question of the undigested immigrant has become serious in the United States. But it has not yet become so critical that we must adopt this un-American method to Americanize our new citizens.

G. F. F.

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[7] See Truax v. Raich, 239 U. S. 33 (1915); Purity Co. v. Lynch, 226 U. S. 192 (1912).

[8] Bartels v. Iowa, 43 Sup. Ct. 628, 630 (1923).

[9] Thus the regulation of rents during the war and post-war period was permitted in New York and the District of Columbia in the emergency caused by the housing shortage in New York City and Washington. Block v. Hirsh, 256 U. S. 135 (1921); Marcus Brown Holding Co. v. Feldman, 256 U. S. 170 (1921).

THE EFFECT OF THE DISCLOSURE OF AGENCY IN SIMPLE WRITTEN CONTRACTS.—Although many of the rigid rules of law which were applied in connection with sealed and negotiable instruments at common law have never been applied to simple written contracts, the product of a busy, hasty and informal age, in theory there was a residuum of formality still hedging such contracts about, which prevented the introduction of parol evidence to vary their apparent meaning. The rule was often described as "undebatable," that parol could not be introduced to vary the effect of a simple written contract, complete on its face, and of obvious meaning.[1] But the many "exceptions" which have crept into the law have made it most debatable today in every jurisdiction, whether the apparent effect of any written instrument cannot be undermined by a rule of law by which "the real intentions of the parties," unexpressed in the writing, can be introduced by parol. Therefore the rules of law applicable to cases in which an agency is alleged as a defense to a suit against a person whom a contract appears to bind personally, are always subject to the almost daily fluctuations of the rules of evidence in respect to the admission of parol.

However, putting aside this qualification, a considerable body of substantive law has been built around situations in which a simple written contract, not under seal, can grammatically and logically be construed as the personal obligation of an agent sued thereon. Such a contract as "The A Company by its president, B, undertakes, etc., . . .," which B has signed with or without words indicating a representative capacity, would not come within the scope of this discussion. The law relating to the corresponding obligation of public officers, executors, trustees, etc., is also in a somewhat different field.

The form of an unsealed written contract is never material,[2] the question being entirely one of the expressed intent of the parties,[3] unless such writing is so ambiguous as to make a sure construction impossible.[4] Hence in the four general classes of situations to be discussed, it makes no difference whether the words indicative of a representative capacity are found in the body of the contract or in the signature.

[1] Naumberg v. Young, 44 N. J. L. 331 (1882); Hebb v. Welsh, 185 Mass. 335, 70 N. E. 416 (1904); Mechem, Agency (2d ed. 1914), Sec. 1176.

[2] Barlow v. Congregational Society, 8 Allen 460 (Mass. 1864); Winship v. Smith, 61 Me. 118 (1869); Whitney v. Wyman, 101 U. S. 392 (1879); Story, Agency (10th ed.), Sec. 154, (quoting): "If it can, upon the whole instrument, be collected that the object and intent of it are to bind the principal, and not merely the agent, courts of justice will adopt that construction of it, no matter how informally it may be expressed."

[3] Mahoney v. Kukulé, 14 C. B. 390 (Eng. 1854); King v. Handy, 2 Ill. App. 212 (1878); Wing v. Glick, 56 Iowa 473, 9 N. W. 384 (1881); Falk v. Moebs, 127 U. S. 597 (1888); Mechem, Agency (2d ed. 1914), Sec. 1166.

[4] Turner v. Thomas, 10 Mo. App. 338 (1881); Society of Shakers v. Watson, 15 C. C. A. 632, 68 Fed. 730 (1895).

In the simplest and most common case of the sort, where the party sought to be held personally liable on a contract has added such words as "agent," "treasurer," etc., to his signature, it has been generally held that the words are mere *descriptio personæ,* and not sufficient proof of an intention not to be personally bound.[5] The same is true where the word appears both in the signature and in the body of the instrument.[6]

In the second class of cases, the signature is followed by a statement of the signer's capacity as representative of a named principal, as "Smith, agent of Jones." Courts have generally applied the same rule, holding the agent liable whether the words are found in the signature[7] or in the body.[8]

Some diversity of opinion is observed in cases in which the word "for" is placed between the word denoting representation and the name of the principal, as "Jones, agent *for* Smith." In the majority of jurisdictions such a signature will release the agent, though this is by no means universal.[9] Yet the agent is bound where the principal is not described specifically, but merely by words of description such as "merchants" or "owners."[10] He is not liable if the words, though identifying no one on their face, were nevertheless clearly intelligible to the parties, as "the owners of the ship 'Ajax'," or initials.[11]

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[5] Mead v. Altgeld, 136 Ill. 289, 28 N. E. 54 (1891); Gavazza v. Plummer, 53 Wash. 14, 101 Pac. 370 (1909); Manning v. Embert, 126 Md. 545, 95 Atl. 64 (1910); United Electric Co. v. Blackton, 128 N. Y. S. 92 (1911); Mechem, Agency (2d ed. 1914), Sec. 1170.

[6] Booth v. Farmers' Bank, 4 Lans. 301 (N. Y. 1871); Landyskowski v. Lark, 108 Mich. 500, 66 N. W. 371 (1896); Candler v. DeGive, 133 Ga. 486, 66 S. E. 244 (1909). *Contra:* Hewitt v. Wheeler, 22 Conn. 557 (1853).

[7] Burbank v. Posey, 7 Bush 372 (Ky. 1870); Phillips v. Knight, 20 R. I. 624, 40 Atl. 762 (1898). Mr. Justice Gray, in Tucker v. Fairbanks, 98 Mass. 101 (1870), said: "In order to exempt the agent from liability upon an instrument executed by him within the scope of his agency, he must not only name his principal, but he must express by some force of words that the contract is the act of the principal, though done by the hand of the agent. A mere description of the general relation or office which the person signing the paper holds to another person or corporation, without indicating that the particular signature is made in the execution of the office and agency, is not sufficient to charge the principal or exempt the agent from personal liability."

[8] M'Williams v. Willis, 1 Wash. 199 (Va. 1793); Avery v. Dougherty, 102 Ind. 443, 2 N. E. 123 (1884); Sun Printing & Pub. Ass'n v. Moore, 183 U. S. 642 (1901); Copeland v. Hewitt, 96 Me. 525, 53 Atl. 36 (1902). *Contra:* Roberts v. Button, 14 Vt. 195 (1842); Goodenough v. Thayer, 132 Mass. 152 (1882).

[9] McCall v. Clayton, 44 N. C. 422 (1853); Mahoney v. Kukulé, *supra* in note 3; Walbridge v. Kilpatrick, 9 Hun. 135 (N. Y. 1876). *Contra:* Crutcher v. The Memphis R. Co., 38 Ala. 579 (1863).

[10] Adams v. Hall, 37 Law Times R. (N. S.) 70 (1877); Ye Sing v. Corbitt, 9 Fed. 423 (1881).

[11] Waddell v. Mordecai, 3 Hill 22 (S. C. 1836); King v. Handy, *supra* in note 3.

There are comparatively few cases reported in which the agent making and signing the contract describes himself *"as* agent" of a specified or unspecified principal. In the case of *Universal Steam Navigation Company, Ltd., v. McKelvie,*[12] recently decided in the House of Lords, an agent was held not to have bound himself personally on a contract signed by him in which he was described simply "as agent." This is contrary to the American case of *Rollins v. Phelps,*[13] in which the facts were practically identical, but it is in accord with the reasoning in *Hutchinson v. Tatham,*[14] an earlier English case in which the agents were described "as agents to merchants" in the contract. The court in that case held the agents liable through the force of a custom of the trade, but declared that it could not do so were there no custom.

Where the agent is styled "as agent of" a named principal, the cases are nearly evenly divided.[15] Prior to the principal case, the English cases held him personally responsible.[16] In case the body of the contract describes the agent "as agent for A," a named principal, and he signs "For A; B, as agent," the combination of the two liability-denying phrases releases him.[17] Nor is he liable if the contract says that the agent is buying "on account of B,"[18] or "for his principal."[19]

The principal case discards once for all the old theory, once firmly imbedded in the law, that an agent for a foreign principal bound only himself on any kind of a contract.[20] It had long since lapsed into innocuous desuetude.

The decision of the principal case, *Universal Steam Navigation Company v. McKelvie,* that a signature followed by "as agent" alone can indicate but one idea—that a person so signing does so *only as agent* and not as principal—seems a most logical and desirable one. Moreover, it was time to overrule flatly such cases as *Lennard v. Robinson,*[21] the facts of which were stronger for the decision than

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[12] 129 Law Times R. (N. S.) 395, May 4, 1923.

[13] 5 Minn. 463 (1861).

[14] L. R. 8 C. P. 482 (1873).

[15] Holding agent liable: Keokuk Improvement Co. v. Kingsland, 5 Okla. 32, 47 Pac. 484 (1896).

Holding agent not liable: Smith v. Morse, 9 Wall. 76 (U. S. 1869); Barlow v. The Congregational Society, *supra* in note 2.

[16] Lennard v. Robinson, 5 E. & B. 125 (Eng. 1855); Paice v. Walker, L. R. 5 Exch. 173, 22 Law Times R. (N. S.) 547 (Eng. 1870).

[17] Green v. Kopké, 18 C. B. 549 (Eng. 1856); Deslandes v. Gregory, 2 E. & E. 602, 2 Law Times R. (N. S.) 634 (Eng. 1860).

[18] Weidner v. Hoggett, 35 Law Times R. (N. S.) 368 (Eng. 1876); Gadd v. Houghton, 35 Law Times R. (N. S.) 222 (Eng. 1876).

[19] Southwell v. Bowditch, 35 Law Times R. (N. S.) 196 (Eng. 1876).

[20] De Gaillon v. L'Aigle, 1 B. & P. 368 (Eng. 1799); Rogers v. March, 33 Me. 106 (1851). Story, Agency, Sec. 268.

[21] *Supra* in note 16.

those of the principal case, the signature being "A, as agent for B" (a named party). However, it is submitted, one cannot help remarking with surprise the *dicta* of Lords Shaw and Sumner, two of the Lords of Appeal in Ordinary, in the principal case, the effect of which is to throw doubt on some of the well-established rules of agency outlined above, in respect to *descriptio personæ*. Lord Shaw says, "The appending of the word 'agents' to the signature of a party to a mercantile contract is, in all cases, the dominating factor in the solution of the problem of principal or agent." It is a "conclusive assertion of agency, and a conclusive rejection of the responsibility of a principal, and is and must be accepted in that two-fold sense of meaning by the other contracting party." Lord Sumner adds, "One's signature is not the place to advertise one's calling, nor is 'agent' ordinarily used to describe a trade, as 'tailor' or 'butcher' would be." This *dictum*, coming from such a court, should be a weighty influence, but its adoption as the law in the future must necessarily mean the rejection, in exceptional instances, of logical rules of construction of long standing in favor of extremely loose business methods.

W. C. F., Jr.

MANUFACTURER'S LIABILITY TO PERSONS NOT IN PRIVITY OF CONTRACT.—A somewhat novel application of the rules of a manufacturer's liability for injuries due to defective articles manufactured and sold, appeared in the decision of a recent New York case, *Rosenbroch v. General Electric Co.*[1] Crane, *J.*, in the opinion, stated that "no distinction can be drawn between a defective instrument and a perfect instrument defectively and dangerously packed, if the product when it leaves the manufacturer is in a latently defective condition, making it inherently dangerous to all who use it as it is intended to be used."

The facts of the case were as follows: The plaintiff's intestate, an employee of the Niagara Power Company, was killed in an explosion caused by a short circuit in transformers, manufactured and sold to the Power Company by the defendant company. The transformers, though not defective in themselves, were packed for shipment so as to be defective for use. Wooden blocks, which should have been removed before the transformers were used, caused the short circuit. The Power Company did not remove them because it did not know of their presence, all previous transformers sent to it by the defendant having been ready for use, except for certain routine preparations. The defendant was aware that vendees would probably not remove the blocks, for it usually sent printed warnings to remove them, with transformers containing them. No such

[1] N. Y. Court of Appeals, 4th Dept. (July 13, 1923), No. 1398.

warnings came with those in question. The court held the defendant liable.

The general rule, based on a misconception[2] of *Winterbottom v. Wright*,[3] is that a manufacturer is liable for injuries resulting from his negligence in the manufacture or sale of articles, only to persons in privity of contract—that is, the immediate vendee.[4]

Two reasons have been assigned for the rule. The first is that the immediate vendee in taking possession of the article and in bringing third persons within the sphere of danger, acts as a conscious intervening agent, breaking the chain of causation between the manufacturer's negligence and the injury to the third person.[5] However, on strict principles of tort law, the chain of causation is not so broken, provided the maker or vendor can foresee that others besides the vendee will probably enter the sphere of danger, as is the case today in the manufacture of most articles, which are sold to dealers or are intended to be used by or near many persons.

The second reason is that it is too great a burden to put upon the manufacturer a duty to turn out a perfect article, not injurious to any one who may use it.[6] But no such duty would be put upon him; he has a duty only to use reasonable care. Should he not have such a duty? A general principle of the law casts a duty on everyone exercising a trade or profession to exercise it with due care.[7]

A realization that the general rule limiting the maker's liability, could not be justifiably enforced in all cases, led the courts to make two exceptions,[8] under which he is liable to third persons: (1) Where the article manufactured and sold is, in its nature "imminently dangerous" to human life, he is liable to those injured by a latent defect, who, he can foresee, will probably use it.[9] (2) Where the article manufactured and sold, though not in itself "imminently dangerous," contains a latent defect, making it dangerous for use

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[2] Cited as authority for the rule that a maker is liable only to person in privity of contract for defects of original construction. No original defect was alleged in the case; merely a lack of repair. See Bohlen, Affirmative Obligations in Tort Law, 44 Am. L. Reg. (N. S.) 281.

[3] 10 M. & W. 107 (Eng. 1842).

[4] Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244 (1891); Lebourdais v. Vitrified Wheel Co., 194 Mass. 341, 80 N. E. 482 (1907); Bragdon v. Perkins-Campbell Co., 87 Fed. 109, 30 C. C. A. 567 (1898).

[5] Huset v. J. S. Case Threshing Machine Co., 120 Fed. 865, 57 C. C. A. 237 (1903); Wharton, Negligence (2d ed.), Sec. 134.

[6] Curtin v. Somerset, *supra* in note 4; Heizer v. Kingsland & Douglas Mfg. Co., 110 Mo. 605, 19 S. W. 630 (1892).

[7] See Bohlen, *supra* in note 2, 293.

[8] See opinion in Huset v. J. S. Case Threshing Machine Co., *supra in* note 5.

[9] Thomas v. Winchester, 6 N. Y. 397 (1852); Norton v. Sewall, 106 Mass. 143 (1870); Texas Drug Co. v. Caldwell, 237 S. W. 968 (Texas 1922).

as intended, and the maker or vendor knows of the defect, but fails to notify the vendee, he is liable to those injured by it.[10]

The term "imminently dangerous" [11] has usually been construed to mean "inherently" or "intrinsically" dangerous [12]—articles dangerous by their very nature—defined as those intended to protect, destroy, or affect life, such as drugs, explosives and firearms.[13] But the courts in some jurisdictions have stretched the term to include articles which, though not dangerous in themselves, become highly dangerous when used as intended, unless safely and properly made.

The New York courts were first [14] to extend the meaning of this term and have continued to extend it in a line of consistent decisions [15] till it covers even an automobile.[16] Massachusetts,[17] and Texas,[18] have a tendency to follow New York. The Federal courts were formerly narrow in their construction of this term,[19] but a United States Circuit Court of Appeals recently directly overruled its own decision rendered on a former appeal of the same case,[20] to follow New York as to automobiles. In Pennsylvania the last cases relating to the subject, which has not recently arisen, merely uphold the general rule without reference to exceptions.[21] It is difficult to derive a principle one way or the other from the English cases on this question.[22]

Under the second exception, the requirement that the maker

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[10] Clarke v. Army & Navy Co-op. Soc., 1 K. B. 155 (Eng. 1903); Lewis v. Terry, 111 Cal. 39, 43 Pac. 398 (1896); Huset v. Threshing Machine Co., *supra* in note 5; Krahn v. Owens Co., 125 Minn. 33, 145 N. W. 626 (1914).

[11] Used first in Thomas v. Winchester, *supra* in note 9.

[12] See opinion, Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474 (1915).

[13] See opinion, Huset v. Threshing Machine Co., *supra* in note 5. See also Larabee v. Des Moines Tent and Awning Co., 178 N. W. 373 (Iowa 1920); Windram Mfg. Co. v. Boston Blacking Co., 239 Mass. 123, 131 N. E. 454 (1921); Laudeman v. Russell & Co., 46 Ind. App. 32, 91 N. E. 822 (1910).

[14] Devlin v. Smith, 89 N. Y. 470 (1882).

[15] Torgeson v. Schultz, 192 N. Y. 156, 84 N. E. 956 (1908); Statler v. Ray Mfg. Co., 195 N. Y. 478, 88 N. E. 1063 (1909).

[16] MacPherson v. Buick Motor Co., 217 N. Y. 382, 111 N. E. 1050 (1916).

[17] Thornhill v. Carpenter-Morton Co., 220 Mass. 593, 108 N. E. 474 (1915); "walnut oil stain" held imminently dangerous, yet in Kusick v. Thorndike & Hix, Inc., 224 Mass. 413, 112 N. E. 1025 (1916), a can of lime, and in Pitman v. Lynn Gas & Elec. Co., 241 Mass. 322, 135 N. E. 223 (1922), a gas flat-iron, held *contra*.

[18] Soap, in Armstrong Packing Co. v. Clem, 151 S. W. 576 (Tex. 1912).

[19] Huset v. Threshing Machine Co., *supra* in note 5.

[20] Johnson v. Cadillac Motor Car Co., 261 Fed. 878 (1919). See also Herman v. Markham Air-Rifle Co., 258 Fed. 475 (1918).

[21] Curtin v. Somerset, *supra* in note 4, and Congregation v. Smith, 163 Pa. 561, 30 Atl. 279 (1894).

[22] See opinion in MacPherson v. Buick Co., *supra* in note 16, 388.

know of the defect, has in some cases been stretched to read merely "ought to have known," in order to hold the maker liable.[23]

The tendency to broaden the two exceptions to the rule would seem to lead ultimately to a denial of the rule itself and to a basing of the maker's liability to third persons on general principles of tort law. Cardozo, *J.*, in the New York Court of Appeals[24] approaches this very nearly[25] when he says: "The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be." The case of *Henry v. Crook*,[26] which seems to deny the general rule, may be distinguished, in that the plaintiff was the immediate vendee.

In the principal case, *Rosenbroch v. General Electric Co.*, the defendant would seem to be liable under the second exception to the general rule: liability to third persons if the vendor knew of the defect and failed to notify the vendee. The defendant knew the blocks were in the transformer—put them there purposely—and knew of the danger due to the probability that the Power Company would not remove them, for it was its custom to send notices warning vendees to remove the blocks before using the transformers. Yet it negligently failed to send these notices to the Power Company. If this case were decided on this ground, it is undoubtedly in line with the decisions of most jurisdictions.[27]

However, the court supports its decision by cases[28] falling under the first exception—cases which extend the term "imminently dangerous," and where the maker did not know of the concealed defects. On this ground, that the transformers were "imminently dangerous" for use as intended due to defects caused by the negligence of the maker, the case falls in line with those cases, though the facts are somewhat novel.

Hitherto in those cases the danger has been due to a defect in the article itself. Here it was a perfect article, yet the manner of packing rendered it defective for use as sent. The result is the same, whether defective due to packing or due to construction. The transformers were defective for use as intended and the defendant could foresee that, in the absence of warning, they would probably be

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[23] Tomlinson v. Armour & Co., 75 N. J. L. 748, 70 Atl. 314 (1907); Olds Motor Co. v. Shaffer, 145 Ky. 616, 140 S. W. 1047 (1911); Davidson v. Montgomery Ward & Co., 171 Ill. App. 355 (1912).

[24] In MacPherson v. Buick Motor Co., *supra* in note 16.

[25] Though it is claimed (20 Harv. L. Rev. 866-868) that Cardozo, *J.*, cast aside the exception entirely in this case.

[26] 195 N. Y. S. 642 (1922).

[27] See *supra* in note 9.

[28] Some of which are: Devlin v. Smith, *supra* in note 14; Torgeson v. Schultz, and Statler v. Ray Mfg. Co., *supra* in note 15; MacPherson v. Buick Motor Co., *supra* in note 16.

used as sent, would blow up, and injure persons in their vicinity, and he could foresee that there would probably be employees of the Power Company in their vicinity when they were used.

Therefore, in this case the defendant was correctly held liable on the principles of the broad New York view, though the decision is an extension of that view to cover a slightly new situation.

G. S. S.

THE LIABILITY OF A SUB-AGENT BANK FOR THE PROCEEDS OF A COLLECTED DRAFT.—The recent case of *Spokane & Eastern Trust Co. v. United States Steel Products Company*[1] presents a number of interesting aspects, because of the problems of law involved and the unusual complexity of its facts. In order to present the issue properly, and to make it in some degree understandable, it is necessary to reduce the statement of the case to its simplest terms, and to eliminate from consideration all unnecessary parties to the transactions which took place.[2] When this is done, it appears that the dispute arose in the following manner:

The X Bank sent the check of the plaintiff, its depositor, to the Z Bank, the drawee. The latter sent it through the clearing house, and obtained two drafts on metropolitan banks, which were forwarded to the Y Bank, the defendant. At the same time the drawee bank drew its draft on the defendant in favor of the X Bank for the amount of the original check. Before this latter draft was presented to the defendant the drawee bank failed and the defendant refused payment, since it had already applied the proceeds of the two drafts to the pre-existing indebtedness of the drawee bank to it. The plaintiff then demanded that the defendant pay over to it the proceeds of the draft and the defendant again refused. The plaintiff then brought suit against the defendant and recovered. The court held that the proceeds of a check in the hands of the col-

[1] 290 Fed. 884 (C. C. A. 1923).

[2] The complete statement, as contained in the report, is as follows: The A Company drew a check on the B Bank in favor of the C Company, the plaintiff. The latter deposited it in the D Bank for collection. The D Bank forwarded the check to the B Bank, through whom it made collections. The B Bank was not a member of the local clearing house, but cleared through the E Bank. The E Bank received the check, cleared it and turned over to the B Bank in payment two drafts, one drawn on the F Bank, and one on the G Bank. Instead of forwarding any of the proceeds of the check to the D Bank, the B Bank transmitted the drafts to the H Bank, the defendant. It then drew a draft on the H Bank in favor of the D Bank. The H Bank cashed the drafts it received, credited the proceeds to the B Bank and then charged back to the B Bank certain re-discounts, bearing the B Bank's endorsement. In this way it applied all the proceeds of the plaintiff's check. Payment of the draft in favor of the D Bank was refused, since the B Bank was insolvent. The C Company then brought suit against the H Bank.

lecting bank constituted a trust fund. In addition the officers of the drawee bank knew of its insolvency when it received the check, and therefore had no authority to make a collection.

It is difficult to understand the transaction. Assuming that the reporter has correctly stated the facts, the first question which at once presents itself is, why should a bank, which receives a check drawn upon itself, send it through the clearing house? In ordinary practice it would merely debit the account of the maker of the check and then transfer the amount for which the check was drawn to the transmitting bank, either by a credit on its books, or by a draft. To send the check drawn upon itself through the clearing house would be of no profit to it and would only result in making its bookkeeping more complicated.

But let us assume that the drawee bank actually did send the check to the clearing house. Immediately the question arises as to how it could receive in payment drafts on another bank. The clearing house, it must be remembered, is an institution for the settlement of differences between banks without the actual transfer of cash. At the beginning of a day each bank in a given locality will have in its possession checks drawn on every other bank. At the same time, every other bank will hold checks drawn upon it. To avoid the endless labor of presenting every item for payment directly to the bank on which it is drawn, all checks are sent to a single point and "cleared." The clearing house, an association of which each bank is a member, credits a bank for each check it presents drawn on another bank; it debits every member for each check which other banks present drawn upon it. At the end of the day the bank has either a debit or a credit balance with the clearing house.

With this explanation in mind, let us consider again the statement of facts in the report. The drawee bank sends the check in question to the clearing house and the clearing house credits it with the amount of the check. But since the check is drawn on the bank, the clearing house must immediately debit it with the same amount. How is it possible under these circumstances for the drawee bank to receive drafts on metropolitan centers for the amount of the check?[3]

There is another objection which must be raised. In the United States it is not considered proper to send a check to the drawee bank for collection.[4] It is usually forwarded to another bank in the same locality, to be presented by it to the drawee. The reason for this is clear; the drawee bank is an interested party in the transaction, hence it should not at the same time be the agent of the cred-

[3] On the general subject of clearing see: Cannon, Clearing Houses; Thralls, The Clearing House; Phillips, Readings in Money and Banking, Chapter 17; Agger, Organized Banking, Chapter 6.

[4] 7 C. J. 608; 1 Morse, Banks & Banking (5th ed. 1917), 472.

itor or *cestui que* trust. Some disinterested third party should be employed. It is usually held that when the transmitting bank forwards a check to the drawee for collection it is guilty of negligence and is liable to the depositor if the drawee surrenders the draft to the drawer as paid and remits worthless paper which, because of its subsequent failure, is never honored.[5]

It is difficult to understand the case on the above basis. It seems probable that there is an error in the reported statement of the facts. A slight change would render the whole situation perfectly clear, and would make the reasoning of the court intelligible. The report says that the check under discussion was drawn on the Z Bank. Later it states that the X Bank sent it for collection to the Z Bank, its correspondent. This, as we have indicated, causes all the complication. But suppose that the first statement were incorrect, and that in fact the check was drawn on the A Bank. Such an assumption would explain everything. The act of the X Bank in sending the check to its correspondent, the Z Bank, for collection would be perfectly proper. The process of clearing the check would be in accordance with banking practice. The presence of the drafts on metropolitan banks would be explained. The question would resolve itself into an interesting, but not unusual problem in the law of trusts. Furthermore, it must be pointed out that the opinion written by the judge of the Federal Court supports this reconstructed statement of the facts. In it he treats the Z Bank as if it were the collecting bank which was to secure the proceeds of the check from some other institution, and not as if it were the drawee, who was merely to debit the drawer and to remit funds which it already had.

Looked at from this point of view, we meet again the question which has been raised many times To whom do the proceeds of an instrument deposited for collection belong? It is an elementary proposition that when one deposits money in a bank, the agreement is not that the bank shall keep that specific money on hand, to be paid back whenever the depositor asks for it. The bank merely promises to owe the depositor that amount, and to pay him on demand out of whatever funds it may have on hand. In other words, the bank does not hold the cash deposited in trust; it acquires complete title to it, and may use it in any way it sees fit. It is the debtor of the depositor, who has no more than a chose in action against the bank.[6]

When one considers the deposits of commercial paper, the situation is a little more difficult. It is possible for the bank to become

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[5] Merchants' National Bank v. Goodman, 109 Pa. 422, 2 Atl. 687 (1885); Bank of Rocky Mount v. Floyd, 142 N. C. 187, 55 S. E. 95 (1906); Smith v. National Bank of D. O. Mills & Co., 191 Fed. 226 (C. C. 1911).

[6] Ames, Law of Trusts, 29, note; Foley v. Hill, 2 H. L. C. 28 (1848); Bank of the Republic v. Millard, 10 Wall. 152 (U. S. 1869); Carr v. National Security Bank, 107 Mass. 45 (1871), (1869).

the debtor of the depositor, just as it did when he deposited money.[7] But it does not necessarily become a debtor. Often the bank is held to be an agent, *i. e.*, a trustee, who is given the paper for the specific purpose of collection.[8] Until this purpose is carried out, the bank does not owe the depositor anything. It has the authority to collect the check or the note, but the depositor has the equitable title, and may recover the instrument from the bank for any sufficient reason.[9] Sometimes the depositor will indorse his check "for collection"; [10] sometimes the bank will include in the pass-book a provision that it shall act only as the agent of the depositor.[11] In such cases there can be no doubt as to the relationship which exists.

But the moment the collecting bank has carried out the mission which was entrusted to it, and has collected the instrument, the better view, denied by only a few cases,[12] is that the relationship between the parties changes. Where, before, the collecting bank was a trustee of the check, it is now merely indebted to the depositor, just as it would have been, had it received a deposit of cash. This is because the bank, having received the proceeds, has the right to mix them with its own funds. The trust has been superseded by a debt.[13]

When a check is drawn on a distant bank and is forwarded to a correspondent for collection, with specific instructions to collect and to remit the proceeds, there is a stronger basis for argument that a trust in such proceeds exists until the funds are in the hands of the depositor's bank.[14] The majority of cases say that it does

[7] Capital & Counties Bank v. Gordon, (1903) A. C. 240 (Eng.); Taft v. Quinsigamond National Bank, 172 Mass. 363, 52 N. E. 387 (1899); Anderson, *et al.*, v. Keystone Chemical Supply Co., 293 Ill. 468, 127 N. E. 668 (1920).

[8] Richardson v. Continental National Bank, 94 Fed. 450, 36 C. C. A. 315 (1899); Morris Miller Co. v. Von Pressentin, 63 Wash. 74, 114 Pac. 912 (1911).

[9] As, for example, the insolvency of the collecting bank before the collection is made. See *infra*, note 18.

[10] First National Bank v. Gregg & Co., 79 Pa. 384 (1875); Manufacturers' National Bank v. Continental Bank, 148 Mass. 553, 20 N. E. 193 (1889); Old National Bank of Evansville v. German American Nat. Bank, 155 U. S. 556 (1895).

[11] South Park Foundry & Machine Co. v. Chicago, Great Western Ry., 75 Minn. 186, 77 N. W. 796 (1899).

[12] Nurse v. Satterlee, 81 Iowa 491, 46 N. W. 1102 (1890); State v. Bank of Commerce, 61 Neb. 181, 85 N. W. 43 (1901); Kansas State Bank v. First State Bank, 62 Kan. 788, 64 Pac. 634 (1901).

[13] Marine Bank v. Fulton Bank, 2 Wall. 252 (U. S. 1864); National Butchers' & Drovers' Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031 (1889); United States Nat. Bank of Omaha v. Glanton, 146 Ga. 786, 92 S. E. 625 (1917).

[14] Holder v. West German Bank, 136 Fed. 90, 68 C. C. A. 554 (1905); Brown v. Sheldon State Bank, 139 Iowa 83, 117 N. W. 289 (1908); State National Bank v. First National Bank of Atchison, 124 Ark. 531, 187 S. W. 673 (1916).

exist, because such instructions show that the collecting bank theoretically should keep the proceeds separate from its own funds and remit immediately.[15] According to this reasoning, equitable title to the instrument or proceeds never passes out of the original depositor. Should the collecting bank become insolvent, he has priority, over the creditors of the bank. If the collecting bank disposes of the proceeds instead of immediately remitting them, the depositor may follow them as long as they can be traced.

On the other hand, it is contended by certain courts that, even where instructions are given to collect and remit, no trust, but a mere debt, exists.[16] The reasoning on which they proceed is that in general practice specific funds are never remitted by collecting banks; that all settlements between the sub-agent and the agent banks are made by debits and credits on the books, or by draft on some third institution. The party who employs a bank to make collections is presumed in the absence of some special agreement to assent to the carrying on of the transaction in the usual manner.[17]

If a bank makes a collection after it has gone into bankruptcy, or when its officers know that it is hopelessly insolvent, the proceeds of that collection constitute a trust fund. Insolvency on the part of the bank terminates its authority to make collections. Any commercial paper which it has received for collection should be left untouched, so that the depositor who has the beneficial ownership may reclaim it. For its officers to collect a check when they realize that their institution is not in a position to carry on business is a fraud. In such a case the depositor will be protected.[18]

Returning to a discussion of *Spokane & Eastern Trust Co. v. United States Steel Products Co.*,[19] it appears at once that the decision is fully justified by the second reason which the court gives,

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[15] If it is agreed between the remitting and the collecting banks that the latter shall remit only at certain times, a different result follows, because such an agreement indicates that the collecting bank has the right to mix the proceeds of the collections with its own funds. Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50 (1892).

[16] First Nat. Bank of Richmond v. Davis, 114 N. C. 343, 19 S. E. 280 (1894); Union National Bank v. Citizens' Bank, 153 Ind. 44, 54 N. E. 97 (1899); Young v. Teutonia Bank, 134 La. 879, 64 So. 806 (1914). See also Hecker, etc., Milling Co. v. Cosmopolitan Trust Co., 242 Mass. 181, 136 N. E. 333 (1922).

[17] "One who collects commercial paper through the agency of banks must be held impliedly to contract that the business may be done according to their well-known usages, so far as to permit the money collected to be mingled with the funds of the collecting bank." Knowlton, *J.*, in Freeman's National Bank v. National Tube Works Co., 151 Mass. 413, 418, 24 N. E. 779 (1890).

[18] Orme & Okey v. Baker, 74 Ohio St. 337, 78 N. E. 439 (1906); Pennington v. Third National Bank of Columbus, 114 Va. 674, 77 S. E. 455 (1913); Clark, etc., Co. v. Americus National Bank, 230 Fed. 738 (D. C. 1916).

[19] *Supra* in note 1.

namely, that the officers of the Z Bank knew of its insolvency, and hence had no authority to collect the check. The proceeds were a trust fund. Furthermore, the evidence shows that the defendant bank was fully informed of the whole transaction in that it knew that the drafts were sent to it to cover a draft in favor of the X Bank.

As to the correctness of the court's first reason, we have seen that there is a complete split of authority. The court follows the majority view, in holding that the proceeds of paper sent for collection and remittance constitute a trust. But it is submitted that the reasoning of the minority is more logical, when the prevailing practice among banks is considered. The proceeds are mixed in the common fund of the collecting bank. The latter remits, not the very money received, but an amount of equal value. The specific *res* which is ordinarily one of the basic elements of a trust disappears. Only a debt remains.

C. W. F.

A Bank as a Holder for Value of Deposited Negotiable Instruments.—It is a common practice for a bank to receive checks or other negotiable instruments from a depositor and to credit the proceeds to his account. But there is a conflict of authority with regard to the stage in the transaction at which the bank is considered as having given *value* so as to become a holder of the instrument in due course, and thereby exclude any defenses available to the maker or drawer as against the payee.

Since this note will be confined only to the question of when value has been given, it is assumed that the bank has fulfilled all other requirements of a holder in due course,[1] namely, that the instrument is complete and regular on its face, that the bank took it before maturity and without notice of dishonor, in good faith, and without notice of any defect in title or infirmity in the instrument, etc. This question though closely related to, should also be distinguished from the question of when title has passed to the bank. Clearly a bank can acquire title to the paper as against the depositor and his creditors so that it could sue in its own name, and yet not be a holder in due course so as to be free of all defenses.

The Negotiable Instruments Law in section 52 (3) states that to become a holder in due course the instrument must be taken for *value*. And in section 25 it defines value as "any consideration sufficient to support a simple contract"; and in section 26 a holder for value is defined as follows: "Where value has at any time been given for the instrument, the holder is deemed a holder for value in respect to all parties who became such prior to that time."

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[1] N. I. L., sec. 52.

Four general situations arise involving the question whether or not the bank has given value for the instrument. The first is where the bank receives a deposit containing checks, or discounts a note, and merely credits the depositor's account with the amount thereof, without doing anything more. Almost all jurisdictions in the United States with but two or three exceptions have held that this does not constitute the bank a holder for value both at common law and under the Negotiable Instruments Law.[2] But in England and Canada the bank has been considered a holder for value from the moment it has credited the depositor's account with the amount of the deposit regardless of the status of the account.[3] A very few jurisdictions in this country have followed the English decisions.[4]

The courts in their decisions have generally made no distinction between the kinds of instruments involved, applying the same rules to promissory notes, checks, etc.[5] But several jurisdictions have made an exception in the case of drafts with bills of lading attached, and have held that the mere crediting of the amount to the depositor's account is sufficient to constitute the bank a holder for value.[6] The motive of these courts has been to aid commercial transactions involving the rapid moving of crops. But other courts have failed to make this distinction and apply the same rules to drafts with bills of lading attached as to other commercial paper.[7]

The view of the majority of American jurisdictions under this first situation unquestionably is the better one, since it takes into consideration the established banking practice. That neither the bank nor depositor consider the mere crediting as an absolute payment is evidenced by the fact that most banks specifically provide on their pass-books or deposit slips that all checks deposited that are drawn

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[2] City Deposit Bank v. Green, 130 Ia. 384, 106 N. W. 942 (1906); Citizens' State Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33 (1905); Tatum v. Commercial Bank, 185 Ala. 249, 64 So. 561 (1914); Merchants' National Bank v. Marden, 234 Mass. 161, 125 N. E. 384 (1919); Varney v. National City Bank, 139 N. E. 326 (Ind. 1923). See notes in 6 A. L. R. 252 and 24 A. L. R. 901, and cases cited therein.

[3] *Ex parte* Richdale, L. R. 19 Ch. Div. 409 (Eng. 1881); Royal Bank v. Tottenham, L. R. 2 Q. B. 715 (Eng. 1894); Bank of British North America v. Warren, 19 Ont. L. Rep. 257 (Can. 1909).

[4] Wheeler v. First National Bank, 3 Tex. App. Civ. Cas. 152 (1886); National Bank of Commerce v. Bossemeyer, 162 N. W. 503 (Neb. 1917). See 17 Col. L. Rev. 631 (1917).

[5] First National Bank v. Wills Creek Coal Co., 110 Mich. 447, 68 N. W. 232 (1896); Standard Trust Co. v. Commercial National Bank, 240 Fed. 303, 153 C. C. A. 229 (1917).

[6] Lewis v. Small, 117 Tenn. 153, 96 S. W. 1051 (1906); Tapee v. Vardey-Wolter Co., 184 Mo. App. 470, 171 S. W. 19 (1906); National Bank of Commerce v. Bossemeyer, *supra* in note 4. (But court does not consider the bill of lading in arriving at the decision.)

[7] National Bank of Commerce v. Morgan, 207 Ala. 65, 92 So. 10 (1921); Worth v. International Sugar Co., 90 S. E. 295 (N. C. 1916).

on other banks are received only for collection. In absence of any special agreement the courts have held that where a check is specially endorsed "for collection" the bank is only an agent for collection until the funds are collected, and the credit is only a conditional one.[8] And even where the instrument is generally endorsed and the bank is regarded as a debtor,[9] as of cash deposited, the purpose of the crediting is to facilitate bookkeeping. And in the event that the check is returned "uncollected," instead of proceeding against the depositor on his endorsement, the bank merely cancels the credit, and returns the check to him. Clearly, therefore, the bank has parted with nothing of value and is not entitled to be considered a holder in due course.[10]

The second situation arises where the bank credits the depositor's account with the proceeds and then permits him to draw out the *full amount* by check or draft, or otherwise to exhaust the credit given, as when the bank applies the proceeds to an overdraft[11] or to pay off a debt due the bank by the depositor.[12] All jurisdictions under these circumstances consider the bank a holder for value,[13] and rightly so, because the depositor has received a consideration. Whether the bank has made the payment on the strength of the paper deposited, or, in fact, upon the credit of the depositor, or upon both, makes no difference in the result.[14] And in accord with the recent Mississippi case of *Bank of Gulfport v. Smith*,[15] the weight of authority has held the bank a holder for value even where it received the instrument "for collection" and entered the deposit conditionally, but subsequently permitted the depositor to withdraw the full amount of the credit.[16] But there are decisions to the contrary.[17]

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[8] Commercial Bank v. Armstrong, 39 Fed. 684 (1889); National Bank v. Hubbell, 117 N. Y. 384 (1889); and *dicta* in Commercial National Bank v. Citizens' State Bank, 132 Ia. 706, 109 N. W. 198 (1907).

[9] See 61 U. OF PA. L. REV. 106 (1912).

[10] Union National Bank v. Winsor, 101 Minn. 470, 112 N. W. 999 (1907).

[11] Hamilton Mach. Tool Co. v. Memphis National Bank, 84 Ohio St. 184, 95 N. E. 777 (1911).

[12] Hatch v. National Bank, 147 N. Y. 184 (1895); Wallabout Bank v. Peyton, 123 App. Div. 727, 108 N. Y. S. 42 (1908).

[13] Hatch v. National Bank, *supra* in note 12; Ironbound Trust Co. v. Schmidt-Dauber Co., 169 N. Y. S. 524, 102 Misc. 408 (1918); Central Savings Bank v. Wachman, 221 Mich. 512, 191 N. W. 5 (1922); City Deposit Bank v. Green, *supra* in note 2.

[14] Bank of Gulfport v. Smith, 95 So. 785 (Miss. 1923).

[15] 95 So. 785 (Miss. 1923), three judges dissenting.

[16] Old National Bank v. Gibson, 105 Wash. 578, 179 Pac. 117 (1919), *overruling* American Saving Bank v. Dennis, 90 Wash. 547, 156 Pac. 559 (1916); Bank of Gulfport v. Smith, *supra* in note 14; Jefferson Bank v. Merchants' Refrigerating Co., 236 Mo. 407, 139 S. W. 545 (1911).

[17] First National Bank v. Stengel, 169 N. Y. S. 217 (1918); Morrison v. Farmers' & M. Bank, 9 Okla. 697, 60 Pac. 273 (1900).

The third situation arises when the depositor has what is known in banking circles as an "active account," and makes deposits and draws checks from day to day. It is frequently difficult to decide whether he has drawn out all or even part of the instrument in question. Thus, where the depositor has withdrawn an amount equal to or more than the balance on hand at the time the instrument was deposited plus the amount of the deposit in question, but has made other deposits which have at all times maintained a balance in his favor in excess of the instrument in question, is the bank a holder for value?

There is a flat split of authority on this question. The apparent weight of authority, however, is that the bank is a holder for value when the full amount of the balance plus the deposit has been withdrawn, in spite of the fact that the balance was kept up by subsequent deposit.[18] These decisions are based on the theory that "the first money in is the first money out." But it is submitted that this is an anomalous doctrine, since it assumes as a basis that deposits made at different times are kept separately, whereas, by the weight of authority, the bank is considered a debtor to the amount of the check before collection, unless the deposit is especially ear-marked.[19] It is therefore difficult to understand how the bank can be regarded as paying out any particular funds first. Furthermore, the deposited checks can hardly be considered as "money" in the hands of the bank until it receives the proceeds from the collecting bank. Another difficulty with this doctrine, which the courts have generally failed to consider, arises when the deposits which are made subsequent to the one containing the instrument in question, but prior to the withdrawals, contains an amount in actual cash equal to or greater than the amount of the instrument in question. In this event the bank has cash on hand to meet the withdrawals long before it receives the proceeds upon the checks. This is particularly true in the case of checks that are drawn upon banks located at a distance, because members of the Federal Reserve system, in order to determine the amount of deposits upon any given day against which they are required to keep a reserve with the Federal Reserve Bank, allow from two to nine days or more to elapse, depending upon the distance of the drawee bank, before considering that item as a part of the depositor's balance on hand. It is natural to assume, therefore, that according to the doctrine itself, these cash items would be the first to be used up by advances. But the courts wholly disregard the distinction between cash and check items.

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[18] First National Bank v. McNairy, 122 Minn. 215, 142 N. W. 139 (1913); Standard Trust Co. v. Commercial National Bank, 240 Fed. 303 (1917); State Savings Bank v. Krug, 108 Kan. 108, 193 Pac. 899 (1920); First National Bank v. McNair, 114 N. C. 335, 19 S. E. 361 (1894). See 69 U. of Pa. L. Rev. 378 (1921).

[19] See 61 U. of Pa. L. Rev. 106 (1912).

The comparatively recent case of *National Bank of Commerce v. Morgan*,[20] however, held the contrary view, deciding that the bank is not a holder for value so long as there is any balance on hand equal to the amount of the instrument in question. This doctrine is supported[21] on the theory that the bank can charge off against that balance any advances made. This would be true if the subsequent deposits were composed of cash, as explained above. But it is difficult to understand how the subsequent deposits can be considered as funds, against which advances may be charged, which would result in the bank's becoming a holder for value of the instruments contained therein, when the prior deposits are not so considered.

It is submitted, however, that in the absence of any cash items the practice of the majority jurisdictions in applying the first withdrawals against the first checks deposited is both practical and fair. But each case should be decided on the exact status of the depositor's account rather than upon any preconceived doctrine such as "the first money in is the first money out."

The fourth situation does not concern the question of whether or not the bank is a holder for value as did the preceding ones, but having determined that it is, instead involves the *extent* to which it is a holder for value. It arises where the bank has paid out an amount equal to only a part of the proceeds of the instrument in question, and applies both where the instrument is treated by itself, as in the second situation, *supra*, and where subsequent deposits have been made which leave a credit balance in the depositor's favor, as in the third situation, *supra*.

At common law, several decisions and *dicta* in a few others, have held that to become a holder in due course the bank must have exhausted the full amount of the credit arising out of the instrument in question.[22] But by the clear weight of authority the bank need not pay out the full amount to become a holder in due course.[23] Several jurisdictions have, however, gone further and decided that even if only a substantial part of the amount credited is withdrawn before notice of the defect, the bank may recover the full face value of the instrument.[24]

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[20] 207 Ala. 65, 92 So. 10 (1921).

[21] Port Washington v. Polonia Phonograph Co., 192 N. W. 472 (Wis. 1923).

[22] Citizens' National Bank v. Buckheit, 14 Ala. App. 511, 71 So. 82 (1916); Tatum v. Commercial Bank, *supra* in note 1; and *dicta* in State v. Emery, *supra* in note 13; and Merchants' National Bank v. Santa Maria Sugar Co., 162 App. Div. 248, 147 N. Y. S. 498 (1914).

[23] Warman v. First National Bank, 185 Ill. 60, 57 N. E. 6 (1900); Security Bank v. Petruschke, 101 Minn. 478, 112 N. W. 1000 (1907); U. S. National Bank v. McNair, 114 N. C. 335, 19 S. E. 361 (1894); *Re* Grocers' Baking Co., 266 Fed. 900 (1920), affirmed in 277 Fed. 1015 (1921).

[24] West Minneapolis First National Bank v. Pearsall, 110 Minn. 333, 125 N. W. 506 (1910); Amalgamated Sugar Co. v. National Bank of Portland,

The provisions concerning value in the Negotiable Instruments Law are sufficiently general to permit the courts to follow their previous line of decisions on all of the situations [25] except the fourth one. In the latter case the statute has evidently made a change. Section 54 of the N. I. L. provides that

> "Where the transferee receives notice of any infirmity in the instrument or defect in title of the person negotiating the same before he has paid the full amount agreed to be paid therefore, he will be deemed a holder in due course *only to the extent of the amount theretofore paid by him.*" [26]

And Section 27 provides that:

> "Where the holder has a lien upon the instrument arising either from contract or by implication of law, he is deemed a holder *to the extent of the lien.*" [27]

Decisions made under both these sections have held that the bank is a holder in due course only to the amount of the proceeds actually withdrawn from the depositor's account before the bank had notice of the infirmities in the paper.[28] A recent case in the Pennsylvania Supreme Court, *Mutual Trust Co. v. Parrish*,[29] is in accord with this view, but the court seems to have failed to take the opportunity to decide flatly that the bank is not a holder for value beyond the amount advanced, which appears to have been the actual question in issue. It therefore seems that the N. I. L. has changed the law in those jurisdictions that previously held either

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187 Fed. 746 (1911); U. S. National Bank v. McNair, *supra* in note 23; Bland v. Fidelity Trust Co., 71 Fla. 499, 71 So. 630 (1916).

[25] First National Bank v. Denfield, *supra* in note 13; State v. Emery, *supra* in note 13.

[26] Italics ours.

[27] Italics ours.

[28] National Bank v. Bonsor, 38 Pa. Super. 275 (1909); Lightfoot v. Bunnel, 76 Pa. Super. 468 (1921); Second National Bank v. Breitung, 203 App. Div. 636, 197 N. Y. S. 375 (1922).

[29] 276 Pa. 422 (1923). Defendant gave a check to X, which X deposited with other checks in the plaintiff bank, and was credited with the amount thereof. Prior to this deposit X's account was overdrawn. Thereafter there was a credit balance in his favor less than the amount of the instrument in question. X became bankrupt and defendant stopped payment on his check, having a set-off against X for moneys X owed him. Plaintiff bank claims to be a holder for value of defendant's check, and sues thereon. *Held:* Plaintiff bank is a *bona fide* holder for value *at least* to the extent of the sum paid out by the bank on his account, and remanded for equity jurisdiction over all the parties.

that the full amount had to be withdrawn to constitute the bank a holder in due course to any amount,[30] or that the bank would be a holder to the full amount although it had only paid out a part thereof.[31] The view adopted by the statute is manifestly the better one, since the bank is always protected to the amount it had actually advanced before notice of the infirmity in the instrument.

S. H. S.

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[30] See note 22.
[31] See note 24.